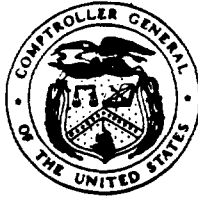


DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-217544

DATE: October 16, 1985

MATTER OF: Alliance Properties, Inc.

DIGEST:

1. Office of Management and Budget (OMB) Circular A-76 does not preclude a protest to GAO from an agency's administrative review of a bidder's appeal of the agency's in-house cost estimate.
2. Protest challenging agency decision to perform services in-house, based on comparison of government cost estimate with protester's bid, is sustained where the estimate and the bid were not based on the same statement of work, as required by OMB Circular A-76. While the agency omitted from its estimate the cost of operating a work reception desk called for in the solicitation, based on a determination that it is a governmental function and therefore should not be performed by an outside contractor, the agency failed to amend the solicitation and notify bidders that the cost of operating the desk should not be included in their bids.

Alliance Properties, Inc., protests the determination by the Department of the Navy that the Navy can perform public works services at the Naval Training Center, Great Lakes, Illinois, at a lower cost than Alliance. This determination, made pursuant to procedures set out in Office of Management and Budget (OMB) Circular A-76, was based on a comparison of Alliance's bid price, submitted in response to invitation for bids (IFB) No. N62472-84-B-6574, with the Navy's cost estimate for in-house performance. Alliance takes issue with several elements of the cost comparison, including the Navy's decision to omit from its estimate the personnel and overhead costs associated with operating a work reception desk called for in the IFB. We sustain the protest on this ground.

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Alliance initially appealed the cost comparison to the Navy, which denied the appeal. Alliance subsequently filed this protest, reasserting the grounds raised in its appeal. In a letter dated April 29, 1985, responding to our request for an agency report on Alliance's protest, the Naval Facilities Engineering Command (NAVFAC) stated that it is "precluded from commenting on issues raised by the protester concerning matters addressed in the appeal process." NAVFAC's position is based on the Supplement to OMB Circular A-76, part I, ch. 2, para. I, which states that the administrative appeal procedure does not authorize an appeal outside the contracting agency and that the appeal decision is not subject to negotiation, arbitration, or agreement.

This argument has already been raised by NAVFAC and rejected by our Office in Griffin-Space Services Co., B-214458.2, Sept. 11, 1984, 84-2 CPD ¶ 281, aff'd on reconsideration, 64 Comp. Gen. 64 (1984), 84-2 CPD ¶ 538. As we stated in our decision in the request for reconsideration in Griffin, we recognize that the underlying determination involved in cost comparisons--whether work should be performed in-house by government personnel or performed by a contractor--is one which is a matter of executive branch policy and not within our protest function; however, where, as here, a contracting agency utilizes the procurement system to aid in its determination of whether to contract out, a protest from a bidder alleging that its bid has been arbitrarily rejected will be considered by our Office. In such cases, we do not believe that OMB Circular A-76, insofar as it precludes further administrative review, can be interpreted to preclude an appeal to our Office. On the contrary, we will review such protests to determine if the agency conducted the cost comparison in accordance with applicable procedures. Griffin-Space Services Co.--Reconsideration, supra.

Due to NAVFAC's failure to submit a report addressing the issues raised by Alliance, our review is confined to the record established by the protester, consisting principally of Alliance's agency appeal and the Navy's response, and to materials we were able to obtain on our own. In its agency appeal and again in its protest to our Office, Alliance challenged various elements of the Navy's cost estimate relating to its calculation of personnel, overhead, and other costs. As discussed in detail below, we agree with Alliance that the cost comparison was faulty with regard to the costs associated with operating the work reception desk called for by the IFB.

The solicitation is for large-scale maintenance services for one base year and two option years at a major Navy training center which includes, among other facilities, a hospital, a school, and a data automation facility. Paragraph C12 of the IFB requires the contractor to operate a central work reception desk for receiving service calls, staffed for 24 hours a day, seven days a week. According to the protester, operating the desk would require four employees to staff the desk, one clerical employee to handle the paperwork, two employees to estimate job costs and material requirements, and one or two employees to schedule the work, for a total of nine to ten employees.

In its appeal to the Navy, Alliance maintained that the Navy's estimate of its own costs to perform the work under the IFB failed to include the cost of operating the work reception desk. In response to this contention, the Navy's reviewing officer stated without further elaboration that operation of the desk had been classified as a "governmental function" and therefore was properly excluded from the Navy's cost estimate.

The IFB was issued on July 2. In August, the contracting activity received approval to classify operation of the work reception desk as a governmental function, which, under OMB Circular A-76, paragraphs 5(b) and 6(e), means that it must be performed by government employees. We interpret this action to mean that the Navy decided that the desk was not to be operated by the outside contractor. The Navy did not amend the solicitation, however, to reflect that the desk would be operated by the Navy, not the contractor. As a result, under the IFB as originally drafted, there would be total duplication of the work desk function, since a work desk would be operated by both the Navy and the contractor. In our view, this cannot be the result reasonably intended by the Navy; instead, it is reasonable to assume that the Navy intended to relieve the contractor of the responsibility to operate the desk, since the Navy has classified it as a governmental function.

A fundamental requirement of the A-76 cost comparison procedures is that the government's cost estimate and the bidders' prices be based on the same statement of work to be performed under the solicitation. OMB Circular A-76, Supplement, pt. I, ch. 2, para. B.1; para. L11 of the IFB. Once it was decided that the work desk involved a governmental function not to be performed by an outside contractor, the IFB should have been amended to delete

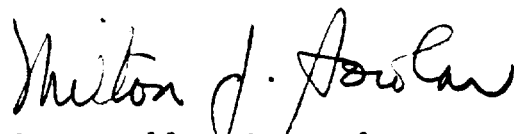
operation of the desk from the statement of work under the IFB and thus put bidders on notice that the cost of operating the desk should not be included in their bids. Since the IFB was not so amended, the protester included the cost of operating the desk in its bid. As a result, the Navy's cost estimate and the protester's bid were not based on the same statement of work, as required by OMB Circular A-76.

The cost comparison showed that the Navy's cost estimate was \$789,786.71 below Alliance's bid. The protester estimates that the cost of operating the work reception desk is between \$750,000 and \$850,000. Based on this estimate, which the Navy has not challenged, it is likely that the inclusion of the cost of operating the desk in the protester's bid had a significant impact on the cost comparison. On the present record, it is unclear whether the exact amount Alliance included in its bid for this function can be determined. If that amount can be determined with certainty, the Navy should deduct that amount from Alliance's bid and recalculate the cost comparison based on the adjusted bid. Assuming the amount cannot be determined, we believe the appropriate remedy to be initiation of a new cost comparison with an amended IFB which accurately reflects the intended scope of work. See Joule Maintenance Corp., B-208684.2, Nov. 15, 1983, 83-2 CPD ¶ 559.

We have reviewed the other alleged improprieties raised by Alliance, but find no other areas where the Navy has been shown to have deviated materially from the applicable cost comparison procedures.

This decision contains a recommendation that corrective action be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations, in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the agency to submit written statements to those committees concerning the action taken with respect to our recommendation.

The protest is sustained.



Acting Comptroller General
of the United States